

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 27 June 2005**

**BALCA Case No.: 2005-INA-00036**  
**ETA Case No.: P2002-CA-09535077/JS**

*In the Matter of:*

**NANCY KLEIN,**  
*Employer,*

*on behalf of*

**JULIA CHOQUE,**  
*Alien.*

Appearance: Roger Gleckman, Esquire  
Los Angeles, California  
*For the Employer*

Certifying Officer: Martin Rios  
San Francisco, California

Before: **Burke, Chapman and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** Nancy Klein (hereinafter “the Employer”) filed an application for labor certification<sup>1</sup> on behalf of Julia Choque (hereinafter “the Alien”) on April 6, 2001 (AF 70).<sup>2</sup> The Employer seeks to employ the Alien as a “cook, private household” (Occ. Code: 35-213).

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<sup>1</sup> Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656. This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

<sup>2</sup> In this decision, “AF” is an abbreviation for Appeal File.

*Id.* This decision is based on the record upon which the Certifying Officer (hereinafter “CO”) denied certification and the Employer’s request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

## **BACKGROUND**

In its application, the Employer described the duties of the position as “cook, season and prepare various foods according to manager’s instructions. Slice, cut, peel or shred vegetables. Bone, skin, slice and cut meats and poultry. Cook, braise, sauté, fry, broil, bake or steam meats and vegetables to required consistency according to recipes and own knowledge of cooking. Season and prepare soups, beans, rice, sauces, salsas, creams, etc. Determine portions. Order supplies from storage. Cook for special occasion and entertainment.” The Employer required two years of experience in the job offered (AF 70). The Employer requested reduction in recruitment, which was approved (AF 64).

In the Notice of Findings (hereinafter “NOF”), issued February 25, 2004, the CO found two deficiencies in the application. The CO concluded that there is a question of whether a *bona fide* offer of permanent, full-time employment exists for the position offered. The CO stated that the Employer had not shown that the job duties described constitute full-time employment in the context of the Employer’s household. The CO noted further that with changes in the Immigration Act of 1990, many employers had applied for skilled workers in domestic occupations since unskilled alien workers have a waiting period in excess of five years. Under these circumstances, the CO noted that employers were inflating the job requirements and job duties so they can submit labor certification applications for skilled positions which do not require the long waiting period. The CO noted that this job position appeared as though it was newly created for the Alien. Therefore, the CO stated that the Employer’s rebuttal must establish conclusively that the job opportunity described on the ETA 750A does in fact exist and that the Employer has a job opportunity for a skilled worker.

Specifically, the NOF listed data which the Employer should submit in rebuttal to support each of its assertions or conclusions. For example, the CO instructed the Employer to provide documentation showing who performed the duties of the position of domestic cook up to now,

the number of meals prepared daily and weekly, the frequency of household entertaining, a list of the Alien's duties, the schedule of any pre-school or school age children, and documentation regarding who performs the general household maintenance duties. As to the last point regarding the performance of general household maintenance duties, the NOF specified, "If the employer states that these duties have been performed by a 'housekeeping agency,' the employer must provide documentation to substantiate this. The employer's information must show how it is not the cook who performs these duties" (AF 67).

The second deficiency noted by the NOF relates to 20 C.F.R. §§ 656.20(c)(1) and (c)(4), which stipulate that an employer must be able to pay the salary and must be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States. Thus, the CO directed the Employer to submit documentation to show that the Employer's income is sufficient to pay the offered wage, including recent W-2 forms, 1099 reports, the Employer's most recent income tax return, or a certified financial statement.

The Employer submitted rebuttal on March 31, 2004. In a letter dated March 18, 2004, the Employer stated that her household had not previously had a full-time cook. The Employer listed the meals the cook would provide daily and in advance for the weekends. In addition, the Employer noted that her husband is a diabetic and, therefore, the cook will be responsible for shopping, meal planning and occasionally meeting with a nutritionist to prepare meals according to her husband's special needs. The Employer also stated that her daughter is 17 and attends school full-time. The Employer also stated that general household maintenance duties are performed by a housekeeper who comes to the house on a weekly basis. Finally, the Employer stated that the ability to pay is substantiated by copies of the most recent tax returns contained in its rebuttal (AF 14-15).

The CO issued the Final Determination on April 6, 2004, denying the Employer's application for labor certification (AF 10-11). The CO stated that the Employer failed to submit any documentation with respect to her allegation that general household maintenance is performed by a weekly housekeeper. The CO also stated that the Employer failed to provide specificity regarding the schedule for the job duties, noting that the Employer's job description

includes clean-up for all three daily meals, which is in conflict with the work schedule which ends at 4:30 pm. Finally, the CO noted that the tax return was not included in the rebuttal.

In addition, the CO stated that if the absence of the tax return were the only deficiency, a second NOF might have been appropriate. However, since the rebuttal information was not sufficient to document that the skilled professional cook position exists in the Employer's household, the CO denied labor certification. The CO reiterated that labor certification was denied because the Employer proposed to create a new position but had not submitted substantial documentation that the job will exist or is truly open to U.S. workers. Specifically, the CO stated, "there is no documentation whatsoever to support that someone other than the alien beneficiary of this application is the houseworker [sic]: there is no name, no W-2, and no information about any agency through which the household worker is hired or paid." (AF 11). Moreover, the CO concluded that the Employer failed to document the ability to pay the offered wage (AF 11).

By letter dated April 1, 2004, the Employer admitted that the tax return was erroneously omitted from the rebuttal package. Thus, the Employer included her tax return from 2002 and her husband's return for 2003 (AF 22-63). In a letter dated August 9, 2004, the CO acknowledged that the tax return package was received on April 9, 2004, after the denial was issued on April 6, 2004. Treating the submission of the tax records as a request for reconsideration, the CO denied the request for reconsideration (AF 9).

On August 24, 2004, the Employer requested review. In its request for review, the Employer argues that the CO erroneously concluded that the Alien beneficiary of the application was also performing work as a housekeeper, and that the CO imposed an additional requirement not set forth in the NOF that the Employer "should have shown how the meal preparation and clean up for each of the three meals per day takes place during the offered work schedule." (AF 11). In addition, the Employer argues that its ability to pay was established in the letter of April 1, 2004 in which it submitted the tax returns (AF 1-2). The case was docketed by the Board on November 29, 2004.

## **DISCUSSION**

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification. *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991). Here, the NOF clearly required documentation regarding who performed the general household maintenance, specifying, "If the employer states that these duties have been performed by a 'housekeeping agency,' the employer must provide documentation to substantiate this." In rebuttal, the Employer stated that she had a housekeeper who comes weekly.

Although an employer's written assertion constitutes documentation under *Gencorp*, *supra*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. We agree with the CO that Employer could easily have submitted documentation to substantiate that a housekeeper comes weekly to perform general household maintenance. Her failure to do so is grounds for denial of the labor certification application.

Furthermore, in *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*), the Board followed *Pasadena Typewriter and Adding Machine Co., Inc. v. Department of Labor*, Case No. CV-83-5516-AAH(T) (C.D.Cal. Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate) stating that the "employer has the burden of providing clear evidence that a valid employment relationship exists, and that a *bona fide* job opportunity is available to domestic workers, and that the Employer has, in good faith, sought to fill the position with a U.S. worker." The Employer's documentation in this matter failed to establish whether a *bona fide* job opportunity is available to domestic workers. The NOF specified that the Employer should list the number of meals prepared daily and weekly; the length of time required to prepare the meals; and the number of people for which such meals are prepared. The NOF also stated that the Employer should list each of the Alien's duties, including cooking, and the frequency of performance of each duty. In rebuttal, the Employer merely stated that the

position required preparation of approximately 17 meals a week, and discussed how the Alien would perform duties such as shopping and consulting with the nutritionist in addition to cooking. The Employer did not, however, discuss the time required to prepare meals. The Employer also failed to list the Alien's duties, including the frequency of performance of each duty on a weekly schedule. Therefore, we agree with the CO that the Employer's general statements regarding the job duties and her failure to state with specificity the time required for the various job duties and the frequency which each duty would be performed are not sufficient to establish that the job duties require full-time employment under 20 C.F.R. § 656.3

In conclusion, the Employer's failure to submit documentation of the housekeeper's employment as requested by the CO in the NOF establishes that the Employer has failed to provide directly relevant and reasonable obtainable documentation requested by the CO and, therefore, labor certification must be denied. *See Gencorp, supra*. Furthermore, the Employer's failure to provide a detailed explanation of the job duties and schedule as requested by the CO demonstrates that the Employer has failed to establish that a *bona fide* full-time job opportunity is available.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when

full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.